

**United States Department of Labor  
Board of Alien Labor Certification Appeals  
Washington, D.C. 20001**

Date: January 30, 1998

Case No. **95 INA 682**

In the Matter of:

**ANITA KIRSCHNER,**  
Employer

on behalf of

**BRONISLAWA STANOCH,**  
Alien

Appearance: P. W. Janaszek of New York, New York, Agent

Before : Huddleston, Lawson, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of BRONISLAWA STANOCH (Alien) by ANITA KIRSCHNER (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer and Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

*Statutory Authority.* Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to

---

<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.

## STATEMENT OF THE CASE

This case involves an application (ETA 750A) for the full time permanent employment of the Alien as a Kosher Household Cook with the following duties:<sup>2</sup>

Prepare, season, and cook soups, meats, vegetables according to Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorate dishes according to the nature of the celebration. Purchase foodstuff and account for the expenses involved.

The Employer also specified in the ETA 750A that the cook would work a basic forty hour week without overtime. The hours were from 9:00 A.M. to 6:00 P.M., at \$12.81 per hour.

The Employer later added to the ETA 750A a statement in which she said she was employed from 9:00 A.M. to 5:00 P.M. as an X-ray Technologist, and that her husband leaves the house for his full-time employment at 8:30 A.M. and returns at 5:00 P.M. She said that her father, who is also a member of the household, is more than seventy years old, has a serious health problem and is required to have five meals served on a regular basis every day. She explained that her heavy schedule prevented her from preparing meals for the household, and that she needed a cook to perform the following work on the schedule indicated:

8:00 A.M. to 9:00 A.M. preparing and serving breakfast for Employer, her father and her husband.

9:00 A.M. to 11:00 A.M. purchase food and prepare itemized accounts for food related purchases.

---

<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. DOT No. **305.281-010 Cook (Domestic ser.)**Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

11:00 A.M. to 12:00 P.M. preparing and serving lunch to the Employer's father.  
 12:00 P.M. to 1:00 P.M. lunch hour for the cook.  
 1:00 P.M. to 3:00 P.M. begin preparing dinner, including seasoning and cooking soups, meats fish and other foods.  
 3:00 P.M. to 3:30 P.M. serving dinner to Employer's father.  
 3:30 P.M. to 4:30 P.M. preparing dinner consisting of soup, main course and salad or desert for Employer and husband  
 4:30 P.M. to 5:00 P.M. serving dinner to Employer and her husband.

The Employer said a cousin had been performing these duties but could not do this any longer. Other household functions were performed by the Employer and her husband in the evenings and on weekends. She added that she did not employ any U.S. workers in her home at the present time.<sup>3</sup>

**Notice of Findings.** The CO's Notice of Findings (NOF) said the application would be denied, subject to rebuttal, on grounds that it did not appear that the duties described by the Employer's application constituted the permanent full time work defined in 20 CFR § 656.3. The CO advised the Employer that she could rebut this finding by amending the job duties or by submitting evidence that the job constitutes full time employment and that it has been customarily required by the Employer. The CO directed that the evidence the Claimant filed shall include the following facts and data:

State the number of meals prepared daily and weekly; the length of time required to prepare each meal; identify the individuals for whom the worker is preparing each meal on a daily and weekly basis; provide a representative one week schedule accounting for eight hours per day/40 hours per week.

If you are claiming you need to employ a cook on a full-time basis because you entertain frequently, you must describe in detail the frequency of household entertaining during the preceding twelve (12) month period. List the dates of entertainment, the nature of the entertainment, guests, the number of meals served, the time and duration of the meal, etc.

Will the worker be required to perform duties other than cooking, i.e., houseworker, child care, home attendant? If yes, list each duty and the frequency of performance.

Evidence employer has employed full-time cooks in the past, i.e., copies of tax and/or social security report forms. If it is your position that a "cousin" Has been performing these duties, you must supply evidence to support that this "cousin" was performing cooking duties exclusively eight hours per day, five days/forty hours per week. Please indicate when this "cousin" started performing these duties.

---

<sup>3</sup>The Alien's statement in Form (ETA 750B) represented that she was currently in the United States on a B-2 Visa, and that she had worked as a Kosher Cook for a family in the United States for a period of three years.

Any other information and evidence that clearly establishes and demonstrates that this is a permanent, full-time job offer that employer customarily has required.<sup>4</sup>

**Rebuttal.** The Employer's rebuttal disclosed that her household also included her twenty year old son, as well as her father, her husband and herself. The schedule for performance of the cook's duties that she presented differed from the schedule appended to the ETA 750A in that it covered a period from 9:00 A.M. to 6:00 P.M. instead of from 8:00 A.M. to 5:00 P.M. that she originally posited. The Employer added, "Please be advised that the presented schedule of work constitutes full time employment. Kosher cuisine requires meticulous preparation of meals and adherence to Kosher laws which is very time consuming. Purchasing of foodstuffs does not involve a simple trip to a supermarket because some of the food items are not available at a regular supermarket. The cook will have to spend considerable amount of time purchasing the foodstuffs in specialty stores." In addition, she appended to the rebuttal photocopies of recipes to show the time consuming nature of the process of Kosher food preparation.

**Final Determination.** The CO's Final Determination denied the application for certification on grounds that the Employer failed to meet the requirements of 20 CFR, Part 656. The CO said that, upon considering the size of the household and the scheduled of the family members, it did not appear that the work described in the Employer's rebuttal would require eight hours per day, forty hours a week regardless of the cuisine the cook was preparing. The CO concluded by denying certification.

**Appeal.** The Employer then requested a review of the CO's denial of this application, and the Appellate File then was referred to the Board.

## DISCUSSION

The primary issue on which the CO appears to have decided this application did not include whether or not the Employer's responses to the NOF establish the business necessity of this position, as the CO focused entirely on whether or not a full time position was proven. Consequently, the issue to determine is whether or not the CO's conclusion that full time employment is not being offered is a reasonable inference from the evidence of record. We think not. The Employer's application for alien employment certification definitively indicated the conditions of employment. 28 U.S.C. § 1746; and see 20 CFR § 656.20(c)(9). The conditions of employment state that forty hours of work are being offered each week at an hourly rate of \$12.48, the adequacy of which is unchallenged by the CO.

There is no evidence to the contrary in the Appellate File, and the CO refused to accept Employer's estimate of the time the cook would take to perform the proposed job duties because it is the CO's opinion that time the Employer assumed the work would require was unrealistic and

---

<sup>4</sup>The CO also directed the filing of evidence as to the care to be provided for any pre-school or school aged children in this household while the parents were absent from the home.

contradictory. The CO concluded that even if the Employer's version of the amount of the time that would be required for each function was accepted, the total would not be equal to an eight hour day. It follows that this dispute comes down to Employer's asserting that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that it will take less time to prepare the meal in question. In the absence of supporting evidence the CO's finding that the duties described would not constitute forty hours of work is speculative at best. Consequently, we conclude that the evidence of record does not support the CO's finding that the Employer failed to offer full time employment.

On the other hand, the NOF did raise an unresolved issue as to the job requirement of two years of specialized cooking experience in the duties of a Kosher cook. The effect of this hiring criterion is to eliminate any U. S. applicant who has two years of cooking experience within the meaning of the DOT position description, but no experience in Kosher cooking. As the CO appears to have confused Employer's proof that this position offers full time employment for a forty hour week with the issue of the business necessity of a restrictive job requirement, the Final Determination cannot be construed as having determined this issue after weighing the evidence in the record as a whole. For this reason, this matter will be remanded to the CO with directions to consider whether Employer's requirement of two years in cooking Kosher foods is unduly restrictive for the reasons discussed above. 20 CFR § 656.21(b) (2)(i)(B). In the event that the CO finds that Employer's requirement of Kosher cooking experience is unduly restrictive, the Employer will then be required to prove that the hiring of a Cook (Household)(Live-Out), specializing in Kosher cooking under DOT No. 305.281-010 arises from business necessity.

As the CO did not consider whether Employer's requirement of experience in cooking Kosher food is unduly restrictive under 20 CFR § 656.21(b)(2)(i)(B), the following order will enter.

## **ORDER**

The Certifying Officer's decision denying certification under the Act and regulations is hereby set aside and this file is remanded for further proceedings consistent herewith.

For the Panel:

---

FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

